Center for Immigration Studies

Backgrounder

April 2003

Officers Need Backup

The Role of State and Local Police in Immigration Law Enforcement

By James R. Edwards, Jr.

In the midst of a war against Islamist terrorists, the United States remains woefully — and frighteningly — at risk. Even with the enactment of new laws such as the USA Patriot Act and the Enhanced Border Security and Visa Entry Reform Act and the reorganization of major parts of the federal government into a cabinet-level Department of Homeland Security, the American homeland is not secure.

Not only are the borders themselves still porous, frequently crossed by criminals, smugglers, terrorists, and other lawbreakers, but the interior has very little federal enforcement presence. The federal immigration service has just 2,000 investigators (the agents engaged in enforcement) out of its 37,000 employees. The Border Patrol is deployed almost exclusively along the border. And the Clinton administration's implicit policy of "we'll make it a little tougher for you to sneak across the border, but once inside our country, we won't touch you" remains in force.

Therefore, while the borders get some attention, the country's interior is its exposed, soft underbelly. Untold hundreds of thousands of illegal aliens live, travel, and quietly undermine U.S. national and economic security within our borders every day.

Among the rogues in the gallery of criminal illegal aliens are Ingmar Guandique, the suspected killer of Chandra Levy; Lee Malvo, the suspected Washington, D.C., sniper; four homeless Mexicans accused of brutally gang-raping a woman in New York last December; Rafael Resendez Ramirez, the serial "Railroad Killer;" and Mohammed Salameh, one of the 1993 World Trade Center conspirator/bombers. Other illegal aliens provide the infrastructure by which the worst ones go about undetected, like the Latin American illegal aliens who assisted some of the September 11 hijackers to exploit loopholes and fraudulently obtain driver's licenses.

Yet, hundreds of thousands of law enforcement officers patrol every community, every mile of road, 24 hours every day. They know their area and can spot people, things, and behavior that are out of the ordinary. But when it comes to enforcing immigration laws, these lawmen largely remain an untapped human resource.

This *Backgrounder* examines the role that state and local law enforcement plays — or does not play — in the enforcement of immigration laws, and its potential for enhancing homeland security. First, it considers the present level of involvement of local police officers in immigration enforcement. Second, the legal authority to enforce federal immigration law is discussed. Finally, a number of recommendations are offered concerning how to improve the part that state and local law enforcement plays in immigration enforcement, were this untapped resource to be made an effective component in homeland security.

State and Local Role

U.S. Attorney General John Ashcroft has called for America's police officers to help secure the homeland. In a speech on October 8, 2002, to the International Association of Chiefs of Police, Mr. Ashcroft pledged that federal agents would respond when local officers notify them of immigration violators

James R. Edwards, Jr., is coauthor of The Congressional Politics of Immigration Reform *and an adjunct fellow with the Hudson Institute.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in local custody. "We must use all lawful means to prevent terrorism," he said. "There are no second chances."[1]

Indeed, this is the most sensible next step in enforcing immigration laws, not only against Islamist terrorists and their immigrant sympathizers, but concerning immigration lawbreakers of every sort. After all, about 96 percent of all U.S. law enforcement officers work for state and local departments.[2] In 1999, there were about 678,000 state and local police, according to the Justice Department. Their involvement in immigration enforcement would be a tremendous force multiplier.

Frequent Contact. Furthermore, state and local police often come into contact with illegal aliens as officers go about their duties. For example, September 11 ringleader Mohammed Atta, while guilty of overstaying an expired visa, was ticketed in Broward County, Fla., in the spring of 2001 for driving without a license. His accomplice, Ziad Samir Jarrah, received a speeding ticket from a Maryland state trooper two days before the terrorist attack.[3]

And such encounters are an everyday occurrence involving illegal aliens not belonging to Al Qaeda. For instance, a sheriff's deputy in Tulsa, Okla., stopped a van on Interstate 244 the night of July 17, 2002, because it was missing a taillight. The deputy found 18 Mexican illegal aliens in the van.[4]

Police in New York pulled over a battered van on the Manhattan side of the Brooklyn Battery Tunnel the Friday of Memorial Day weekend 2002, just as the Office of Homeland Security issued a terrorism alert. They found seven illegal aliens from the Middle East, with a host of identification documents — one was a fake card obtained in Times Square, another a phony passport.[5] Highway patrolmen in Rogers County, Okla., arrested seven Latino illegal aliens August 5, 2002, on alcohol and drug misdemeanors. They had taken an illegal turn.[6]

Thus, because local police officers routinely encounter illegal aliens of all types, to involve local lawmen in keeping a lookout for immigration violations within U.S. borders makes common sense.

However, three general, practical problems limit the degree to which state and local police authorities are involved in enforcing immigration law. An additional barrier has more to do with attitude than practicality.

Generally, police at the local level often lack clarity about the extent of their authority concerning immigration law. Also, police officers on the beat lack timely access to specific information about aliens with whom they come into contact — revealing whether or not they have a lawbreaker on their hands. And then there is the practical constraint of limited resources — jail space, sufficient funds to hold aliens or transport them to the immigration service, and so forth.

Confused About Authority

Though state and local police officers have the legal authority to enforce federal immigration laws (this is explored more fully in the following section), officers may not realize this. Some people have tried to create a perception of an arbitrary distinction between immigration and other federal laws, and local officers may be uncertain whether the law or the Constitution grants them authority regarding immigration offenses; however, police at the local level often make arrests for other federal offenses.

They may not know whether an illegal alien has committed a criminal immigration offense or not, but most immigration offenses, such as entry without inspection, fraud, and alien smuggling, are felonies. Gray areas exist, however. For example, to enter the country by sneaking across the border is punishable under the federal criminal code (INA Sec. 275), while overstaying a temporary visa is but a deportable offense (INA Sec. 237(a)(1)(C)(i)).

Police officers also may hesitate to scrutinize a suspect too closely for fear of being charged with racial or ethnic discrimination. Such lawsuits as that won against Chandler, Ariz., in 1997, when police questioned about 400 people for proof of citizenship, can have a chilling effect on local law enforcement's getting involved in immigration matters.[7]

Federal authorities do not help the situation any when they add to the confusion. For example, an INS deputy district director in Georgia was quoted, "It's not a crime to be in the U.S. illegally. It's a violation of civil law."[8] An INS spokesman in California referred to aliens unlawfully present as "law-abiding citizens" (they are neither).[9] Such statements, though clearly wrong, serve to muddle local law enforcement's understanding of what the immigration code says and how they should handle suspected violations.

Liberal activists, such as the American Civil Liberties Union, and other high-immigration advocacy groups employ intimidation tactics to dampen local law enforcement's inclination to exercise its authority in immigration matters. For example, the ACLU promptly used this tactic when a Stratford, Wis., policeman arrested an erratic driver who was a Mexican

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Because local police officers routinely encounter illegal aliens of all types, to involve local lawmen in keeping a lookout for immigration violations within U.S. borders makes common sense.

alien. This led to the officer's discovery of five other illegal aliens, whom the policeman questioned about their immigration status, resulting in four being removed from the country.[10]

All told, such a situation causes many local law enforcement agents to forego, or at least second-guess, their authority over immigration violations.

Information Is Empowering

Police officers on the beat must have timely information about lawbreakers and fugitives to enforce the law effectively. To help them, the National Crime Information Center (NCIC), maintained by the Department of Justice, lists such information as outstanding warrants and fugitives. This powerful source supplies law officers with ready access to information in a quick, single inquiry and has become part of standard police procedure and Information Age crime-fighting culture.

Unfortunately, NCIC contains few records pertaining to immigration offenses. Only in 2002 did the Department of Justice begin listing absconders on NCIC. Absconders, those who have not left the country under final order of removal, make up an estimated 314,000 of the eight to 10 million illegal aliens. Only a fraction of the total number of absconders has yet been entered on the NCIC database, beginning with Middle Easterners.[11]

The Bureau of Immigration and Customs Enforcement (BICE, formerly the INS) operates the Law Enforcement Support Center (LESC) to assist local law officers. The LESC provides local police with access to BICE data on immigration violators. However, accessing LESC requires a secondary contact in addition to NCIC. LESC checks take much longer to get an answer, perhaps two or more hours (BICE claims most are answered within 20 minutes). It hasn't been available to police in all 50 states and is not part of the law enforcement culture.

Post-September 11, though, information-sharing is on the rise. State and local law enforcement — among the "first responders" — are being brought increasingly into the picture of homeland security. The State Department is making available to local law enforcers its database of sensitive information about overseas applicants for American visas. This database contains records on some 50 million visa applicants and has 20 million photographs.[12] Yet, as useful as this move is in providing detectives nationwide with this investigative tool, it will not be as useful to the officer on the beat for getting quick answers.

More Resources Needed

As with most government agencies, state and local law enforcement departments must cope with limited resources. Most police agencies could always do with more money, more personnel, more equipment, more jail space, and so forth. The same holds when it comes to immigration enforcement.

Local jails may serve as detention space for holding illegal aliens. This gives the BICE additional bedspace where illegal immigrants may be kept following the time local police have captured them and until immigration officers take custody. This short-term custody of illegal aliens is a built-in stopgap measure.

But detaining illegal aliens, even for only a short time, can become costly. And the cost is borne principally at the local level. A 2001 study by the U.S./Mexico Border Counties Coalition estimated the annual cost of law enforcement and criminal justice associated with illegal immigration in those Southwest counties alone at $108.2 million in 1999, or 12 percent of the cost of these counties' related expenditures.[13]

The State Criminal Alien Assistance Program (SCAAP), through which the federal government reimburses a portion of the cost of locally detaining illegal aliens, does not come close to the full amount. One Arizona sheriff said SCAAP pays 23 cents for every dollar an illegal immigrant imposes on his county jail. And Sen. Jon Kyl, (R-Ariz.), said his state spent $305 million housing illegal aliens in 2002, while the federal reimbursement was only $24 million.[14] SCAAP received just $585 million in total funding in 2002, and Congress appropriated just $250 million in the new 2003 spending bill.

Similarly, the costs that aliens impose on American prisons are high. A private analysis found the cost of incarcerating aliens in state and federal facilities was $849.1 million in 1999. It said 54 percent of federal inmates were aliens, while about 5 percent of state inmates were immigrants. The North Carolina legislature has passed a new law allowing alien prisoners to be transferred to their home country's prison, which could save state taxpayers an estimated $3.55 million each year.[15]

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Other Burdens. In addition to the financial burden that jailing aliens places on state and local detention facilities, other burdens exist that serve to exclude many local jails from being used at all. According to congressional research, BICE regulations require that any county or municipal jail where aliens are detained must meet absurd, unreasonable standards. These requirements make little sense in most American counties and far exceed the American Correctional Association standards, which 21,000 jail facilities meet.

BICE standards say aliens must have access to law books in their own language. Activist lawyers and advocacy groups must have access to inform detainees about U.S. immigration law and procedures. The BICE rules dictate two hot meals per day, micromanage the contents of cold meals, and demand consideration of detainees' ethnicity in meal planning. Further, the standards require detainee access to resources, services, instruction, and counseling in their religion. The intent of such requirements is to diminish the use of local jails for detaining illegal aliens.

Though the Immigration and Nationality Act provides for civil penalties to be assessed against illegal aliens for many offenses, the general practice of the federal government is to forego assessing fines. That is, the lawbreaker receives virtually no punishment for getting caught for his crime. This means that if an illegal alien is caught, the worst that he or she receives is free transportation home.

The net effects of all this are that lawbreakers suffer no consequences and state and local police are burdened with heavy costs and regulations. Ultimately, state and local taxpayers bear the heaviest costs associated with taking immigration lawbreakers off their streets. Whereas with enforcing drug laws local law enforcement may gain resources — such as the forfeited assets of drug dealers — local police usually get nothing for helping in immigration enforcement.

Attitude Is Everything

Perhaps most detrimental to keeping state and local police sidelined in the battle to secure the homeland is attitude. Some localities adopt policies that constrain police from enforcing immigration law (more on this in the following section). The attitude is, immigration is the federal government's job, not ours. Still, those localities that do wish to exercise their authority in this arena are often met with what appears a lackadaisical, uncooperative attitude from immigration authorities.

The perception among many in law enforcement is that the INS, now BICE, lacks the will to help them enforce immigration law. After Attorney General Ashcroft's appeal for the help of local police regarding aliens, Billings, Mont., Police Chief Ron Tussing's response was not atypical: "Tussing said his past experience with immigration agents makes him skeptical of the new program. Before he was chief of police in Billings, Tussing was superintendent of the Nebraska State Police where officers often encountered illegal immigrants.

"'We'd call them (INS) up and they'd say let them go, we're too busy,' Tussing said."[16] Indeed, the two instances of Oklahoma officers encountering illegal aliens in traffic stops in the summer of 2002, as well as the New York encounter with illegal aliens before Memorial Day 2002, each involved local law enforcement contacting INS and being told INS could not come take custody of the aliens. Similarly, INS officers in Dallas released 25 illegal aliens into the United States after they were caught being smuggled into this country in a tractor-trailer.[17]

The perception INS has created has sparked indignation among many officials, including members of Congress. For example, U.S. Rep. John Sullivan (R-Okla.) met with INS seeking greater support for local law enforcement in such instances.[18] Kittery, Maine, Police Chief Edward Strong became concerned when his department stopped Bulgarian and Colombian visa overstayers, contacted the INS, and was told to release them. Strong held a press conference on October 30, 2002, at which he said "his department often arrests illegal immigrants at the outlet malls for shoplifting and other offenses. These people are turned over to INS, but only to be released."[19]

Little or No Help. Northampton County, Pa., District Attorney John M. Morganelli has cited the INS as being grossly uncooperative in going after immigration violators. "Unfortunately, while the influx of illegal aliens continues at full throttle, as a local prosecutor I can honestly say that there is little to no help from the federal government concerning this issue," Morganelli said. He told of a case involving 12 illegal aliens committing identity fraud using Social Security numbers. Yet immigration agents "discourage this type of investigation," he said.[20]

One of the most prominent cases that further cemented INS's poor reputation was that of Lee Malvo, who was arrested in the Washington, D.C., sniper case. An illegal alien from Jamaica, Malvo and his mother

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

— also an illegal alien — were encountered by local police in December 2001. Uma Sceon James and John Mohammed were disputing who had custody of Malvo. Police called the Border Patrol, whose agents in Bellingham, Wash., arrested the illegal aliens. The Border Patrol handed James and Malvo over to INS with the understanding INS would hold them in detention until removal, which is what the law requires. However, the INS violated the law and regulations and released the illegal alien pair, who indeed fled.[21]

The INS has consistently fallen behind in its enforcement mission, borne out systematically as well as illustrated in anecdotal evidence. The Justice Department Inspector General recently examined how well INS had improved its performance removing aliens under final order of removal (formerly deportation) and found that the INS had made virtually no progress. Of aliens under final order of removal whom the INS held in detention, the removal rate was 94 percent in 1996 and 92 percent in 2001 (though the fall might possibly be explained by a small sample size). But of aliens under final order of removal who were not detained, the INS removed only 13 percent in 2001 (11 percent in 1996). [22]

Within specific categories of aliens, the Inspector General found INS removed only 6 percent of nondetained aliens from nations that sponsor terrorism. Only 35 percent of nondetained criminal aliens — a class the INS claimed was its first priority for removal — actually got removed. INS failed to remove 97 percent of non-detained removable aliens whose asylum claims were denied, including terrorists and other criminals, such as Hesham Mohamed Hadayet, the Los Angeles Airport gunner of July 4, 2002, Sheik Omar Abdel Rahman, a leader in the 1993 World Trade Center bombing, and Ramzi Yousef, the 1993 World Trade Center mastermind. [23]

Very Few Officers. As much as INS has contributed to its own disrepute, the agency is not entirely to blame. For one thing, the understaffed enforcement side (now combined with Customs and other federal law enforcers in the new Department of Homeland Security) has very few officers to deploy — only about 2,000 for the entire nation. And those are mostly investigators, skilled agents who concentrate on complex cases, such as alien smuggling rings, fraud schemes, and the like. From the standpoint of the best use of limited resources, it does not make sense to pull the equivalent of a detective off his investigation in order to drive across the state and take custody of what may appear to be plain old illegal aliens.

> "Unfortunately, while the influx of illegal aliens continues at full throttle, as a local prosecutor I can honestly say that there is little to no help from the federal government concerning this issue."

INS has been cooperative with local law enforcement when it has special resources available. For example, the late 1990s saw the development and congressional funding of Quick Response Teams (QRTs). The job of QRTs is to assist state and local law enforcement agencies in immigration cases. This has been a welcome addition to interior enforcement.

And the Atlanta District INS office established a partnership with law enforcement in Dalton, Ga., in 1995. It successfully coordinated investigations, arrests, and removals of illegal aliens and disrupted the criminal and documentation counterfeiting enterprises that facilitated illegal immigration in Whitfield County.[24]

Part of the INS problem is the continuation of Clinton-era policies that undermine any rigorous enforcement of immigration law. Then-INS Commissioner Doris Meissner, in a November 17, 2000, memorandum that established a lax policy, defined "prosecutorial discretion" in such a way that district personnel were discouraged from being tough on immigration crimes. The memo laid out a game plan for deciding not to proceed at every step in the process. It reads, in part:

> *"In the immigration context, the term [prosecutorial discretion] applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.*
> …
> "As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

[emphasis in original] . . . A [district director's] or [chief patrol agent's] exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority.

…

[I]mmigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a latter stage suggest that a favorable exercise of prosecutorial discretion is appropriate."[25]

In other words, the Meissner doctrine sought to undercut congressional intent in the landmark 1996 immigration reform law. The memo provided a plethora of ways and opportunities for immigration field officers not to pursue illegal aliens, signaled that they should exercise "prosecutorial discretion" freely, and directed that prior decisions not to prosecute an alien further insulate that alien from future prosecution.

And, of course, the government is overwhelmed by the sheer volume of aliens, legal and illegal, present in the United States. Numbering in the tens of millions, lawful permanent residents, legal temporary visitors, and illegal aliens of every kind far exceed the government's ability to ensure that they abide by the law and their visa terms, and otherwise pose no threat.

Legal Authority

State, county, and municipal law enforcement officers are sworn to uphold the law. This includes upholding the U.S. Constitution and implies federal laws. As a 1996 Department of Justice legal opinion put it, "It is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests."[26] The current Justice Department Office of Legal Counsel has reportedly read the law and the Constitution even more in accord with the Founding Fathers.

It is important to keep in mind that the states "may be regarded as constituent and essential parts of the federal government," Madison wrote in Federalist 45. The states "retain under the proposed [and adopted] Constitution a very extensive portion of active sovereignty." Federalist 39 makes clear that the U.S. Constitution established a federal, not a national, government.

This element of original intent is essential to understanding the fact that states remain sovereign entities. These sovereigns have broad jurisdiction they may freely exercise. It is worth reviewing the Ninth and Tenth Amendments to the U.S. Constitution, which read, respectively:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In other words, the sovereign states may exercise their active sovereignty.

Except where expressly prohibited from exercising certain powers, the "permission" the Clinton Justice Department's legal opinion mentions that local police have derives from the Constitution itself. States, as federal constituents, retain police powers apart from what any federal statute may designate. This is basic American government.

In April 2002, news reports told of a draft legal opinion under consideration by the Bush Justice Department, apparently premised on this standard reading of the Constitution. *The New York Times* reported that, "The legal counsel's opinion says that states and localities, as 'sovereign entities,' have the 'inherent authority to enforce civil as well as criminal violations of federal immigration law,' according to officials who have read it."[27] DOJ will not make the opinion available, so it is impossible to know exactly how the opinion is reasoned. Unknown remain the rationale, the argument, the cases and authorities, and what constitutes the draft. However, the Attorney General seems to have been advancing the conclusions of the opinion in such things as his 2002 speech to the police chiefs convention.

The Washington Post erroneously reported that the draft opinion "would give state and local police agencies the power to enforce immigration laws," a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

power they inherently possess under a proper understanding of the relation of state to federal government and of the U.S. Constitution.[28] The Justice Department seems to be simply (and properly) recognizing this fact.

However, because the 2002 draft opinion has not been published, as a practical matter the published 1996 opinion remains the operative policy until it is superseded by the new one. Of course, states and localities may certainly exercise their authority absent the new opinion's publication, as the Clinton administration's legal opinion does not supplant the Constitution. But bureaucrats and government lawyers aren't known for relying on the actual Constitution when some recent court opinion or policy statement runs to the contrary.

In contrast to the 2002 draft DOJ opinion, the 1996 DOJ legal opinion narrowly read the legal authority of state and local law enforcement as it pertains to federal immigration laws. It said that state and local police "may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization [sic] Act," but not "solely on suspicion of civil deportability" and could hold criminal alien suspects "for periods as long as 45 to 60 minutes" to allow Border Patrol to arrive.[29]

The Clinton-era DOJ opinion relied heavily on Ninth Circuit decisions. Nevertheless, the opinion did recognize that certain violations in the INA are in fact criminal violations. It further argued that illegal entry may not be a continuing offense (meaning that, once inside the United States, the offending alien has completed his crime, a misdemeanor under INA Sec. 275). This point was based on a Supreme Court case, INS v. Lopez-Mendoza (468 U.S. 1032 (1984)). In that case, the Court chose not to address the question of whether the presence of an illegal alien who illicitly crossed the border "is a continuing or completed crime." In addition, DOJ specified that "federal law does not require state law enforcement agencies to assist in enforcing the INA."[30]

Two Recent Rulings. Whereas the Ninth Circuit Court of Appeals is not known for sound opinions that respect the rule of law or the Constitution, at least two recent decisions in the Tenth Circuit strengthen the hand of local law enforcement. The U.S. Supreme Court declined to hear an appeal of one of those cases.

In February 1998, an INS agent observed what appeared to be a drug deal outside a restaurant in Edmund, Okla. He called a local police officer and told him what he had seen, as well as suspicion about the immigration status of one of the men. The officer investigated, then arrested the Hispanic suspect, a restaurant employee, because of his being an illegal alien. Later on, the officer learned that the alien "had a history of prior criminal convictions and deportations."[31]

> Federal agents and state and local police must cooperate with one another if the tremendous loopholes that exist are to be plugged.

The appellate court ruled in U.S. v. Vasquez-Alvarez that "statute authorizing state and local law enforcement officials to arrest and detain aliens in certain circumstances if aliens had been deported or had left United States after previous felony conviction did not limit or displace preexisting general authority of state or local police officers to investigate and make arrests of criminal illegal aliens."[32] The court noted Oklahoma's state law as permitting local police to enforce federal law, including immigration law. The Supreme Court denied a writ of certiorari. Thus, while the court rightly affirmed the legal authority of state and local police to arrest and detain immigration violators, it relied on state statute exercising this power explicitly, as well as limiting jurisdiction to criminal violations. Therefore, this decision was in the right direction, but fell short of the vigorous "inherent authority" where civil immigration violations are concerned.

A second case recognized that local police may arrest suspected immigration violators with probable cause of immigration violations. In 2001, the Tenth Circuit held in U.S. v. Santana-Garcia that a Utah state patrolman had such probable cause. The officer stopped a vehicle for a traffic violation. The driver, who did not speak English, had no driver's license. In talking with an English-speaking passenger, the officer learned that the two aliens were traveling from Mexico to Colorado. The state trooper asked if the men were legally in the country, and both admitted they were not.

The appellate court said that the officer had probable cause to hold the aliens based on the exchange about their international travel and admission of being illegally present. The court cited the Utah peace officer statute, which grants authority for warrantless arrest for "any public offense."[33] Here again, this court affirmed a state's right to empower its law officers concerning federal immigration laws. But it remains unclear how the court might have ruled absent the traffic violations and related facts.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Deputizing Local Police. One provision of federal law expands the role of local and state law officers by allowing them to be deputized as federal immigration agents. Section 133 of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (INA Sec. 287(g)) is in addition to any inherent or existing state statutory authority over immigration matters. Section 133 allows states or localities and the U.S. Attorney General to enter an agreement. Under such an agreement, a cadre of local or state officers is trained as immigration specialists. That is, the police officers become more or less deputized as immigration officers after undergoing intensive special training.

Florida entered a Section 133 agreement with the Justice Department in 2002. South Carolina and Alabama number among other states that have expressed interest in a similar agreement. Florida trained 35 officers in order that they may work on regional security task forces around the state.[34] In any event, Section 133 arrangements are specialized, rather than general usage of state and local police to enforce immigration laws in the course of their carrying out their duties.

Additionally, Section 372 of IIRIRA grants the Attorney General the authority to call upon state and local police in an immigration emergency. In case "an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response," state or local law officers could be granted "any of the powers, privileges, or duties" of a federal immigration officer (INA Sec. 103(a)(8)). The Justice Department has recently changed the rule that implements this provision, waiving or lowering onerous training requirements in certain extreme emergency situations. [35]

Prohibiting Cooperation. Finally, whereas states have the power inherently under the Constitution to enforce federal immigration laws, states and localities sometimes adopt policies that limit their own officers' authority in this area. A number of places have enacted such policies. However, to do so violates 1996 federal laws intended to ensure that state and local government personnel assist immigration authorities.[36]

For example, New York City has such a sanctuary policy. Then-Mayor Edward Koch issued an executive order (E.O. 124) in 1989 that prohibited city employees from reporting illegal aliens to the INS. The policy was continued under his successors, including Rudy Giuliani and Michael Bloomberg post-September 11. This despite federal court rulings against the city's policy.[37] At a recent House hearing, a witness from the New York City government claimed the city now is in compliance with federal immigration laws. He repeatedly asserted that though the law "forbids state and local governments from prohibiting or placing restrictions on the reporting of immigration status information to the INS, it does not . . . [impose] an affirmative duty on police officers to report."[38]

The Seattle City Council recently adopted a policy restricting city police and employees from questioning anyone about immigration status. This ordinance appears to violate federal immigration and welfare laws; it prohibits city workers from "engag[ing] in activities designed to ascertain the immigration status of any person." However, police officers may inquire about "immigration status if they have 'reasonable suspicion' to believe the person has previously been deported and has committed a felony" and may help the immigration service as the law requires.[39] This exception has yet to play out in practical terms. This policy follows such localities as Chicago, San Francisco, Los Angeles, and Houston.[40]

Some local law enforcement officials keep their officers from enforcing immigration violations that are not connected to another crime. For instance, Denver has such a policy.[41] St. George, Utah, and San Diego and Stockton, Calif., police officials also demand that their police officers not enforce the law regarding immigration offenses.[42]

Thus, the Constitution reserves to the states the right to enforce federal laws, including immigration laws, within their jurisdictions. Federal laws enacted in 1996 limit state and local power to restrict immigration enforcement. While courts have generally upheld state prerogative to engage actively in immigration enforcement, additional tools such as Section 133 give even greater abilities for states and localities to become more involved in this area. Though some law enforcement authorities and local politicians have shirked their responsibility regarding immigration law, and the Clinton Justice Department policy statement sought to minimize state and local involvement, this strain runs counter to the facts. The Ashcroft Justice Department has rightfully recognized this and appears to be taking steps to set the matter right. It remains to be seen whether the new Department of Homeland Security follows suit or falls into the Clintonian model of wink-and-nod "enforcement."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Recommendations

Federal agents and state and local police must cooperate with one another if the tremendous loopholes that exist are to be plugged. Those loopholes frustrate the rigorous enforcement of immigration law violations. The solution dovetails with the main sources of the problem. A seamless system for immigration enforcement will address authority, information, and resources.

Authority. There should be no question in anybody's mind that authority exists for state and local law officers to enforce federal immigration laws, criminal and civil. The Justice Department has made a valuable contribution with the development of its "inherent authority" theory. It should publish this opinion without delay and supersede the former, narrow interpretation from the previous administration.

However, because administrations change, it is not sufficient to rely on a DOJ legal opinion or to place faith in the courts. A clear, statutory statement in federal law should affirm that state and local law enforcement have authority to enforce immigration laws — not in the sense of a special cadre of deputized immigration agents, but in the sense of every police officer while carrying out his normal duties. Also, states should be urged to grant explicit authority to enforce immigration laws in their peace officer statutes.

Information. Second, the police officer on the beat must have access to information about immigration violators. The most practical measure would be to build on the current system. Therefore, all available files on immigration violators should be placed in the NCIC system. The addition of absconders should be completed as quickly as possible, with other immigration offenders added after that. This measure would get the information in officers' hands quickly and would not necessitate a secondary inquiry to a totally different system.

Another step could be to require "no bail" status be placed on every immigrant offender's record. Illegal aliens should be viewed as flight risks because of the nature of their offense. "No bail" status would alert local police of the risk of flight and keep the person from posting bail and disappearing.

Information-sharing works best when it goes in both directions. Even if a state or locality does not have its officers enforcing immigration violations apart from other offenses, every police agency should report to the federal government its officers' encounters with illegal aliens. Such reporting would create a record to help track illegal aliens and to unveil patterns of travel, trafficking, and operations.

Resources. Resources must be provided to fund this enhanced activity at the state, local, and federal levels. The best place to look for money would be illegal aliens themselves. A system of fines and penalties would hold individuals personally responsible for their lawbreaking. Fines that exist in current law should be imposed routinely and waived rarely. Individual responsibility would restore meaningful consequences to the breaking of U.S. immigration laws. The worst offenders should face the forfeiture of their assets.

Grant programs such as the State Criminal Alien Assistance Program, whose funding was halved in the latest federal budget for fiscal year 2003, should instead be raised to at least $1.5 billion per year (the approximate cost of detaining criminal aliens) and steadily increased from there.

In addition to clear authority, information, and resources, several more changes must be enacted for a smooth, efficient system. First, every type of immigration violation must be considered a criminal violation. Arcane distinctions and discrepancies in the law create gray areas, cause uncertainty in the minds of law enforcers, and dampen the inclination to enforce the law.

Also, additional means of detention, processing, and taking custody are necessary. While immigration investigators should not be pulled off their important work, there still needs to be some way to get captured illegal aliens into the hands of federal immigration authorities. A separate force of, say, uniformed BICE officers charged with detention and removal in cooperation with and response to local law enforcement would be one solution. Simplifying detention standards and making greater use of local jail space for alien detention would be another solution. Establishing a circuit-riding system, whereby federal officers regularly come by and take illegal aliens off the hands of local police, might be another. Yet another approach is to contract out the transportation of illegal aliens to private security or corrections firms, or for the federal government to contract with sheriff's departments, the U.S. Marshals Service, or the Federal Bureau of Prisons to transport illegal aliens. Perhaps a combination of all these solutions could be used, depending on which works best in a given area of the country.

Improved use of technology, such as videoconferences to remote areas for expansion of the Institutional Removal Program or mobile access to databases such as the IDENT system, would enhance

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

local immigration enforcement in an effective manner. Creation and deployment into interior states of additional Quick Response Teams would boost needed human resources that have proven effective.

The federal government must change its policies so as to encourage, not discourage, immigration enforcement. Authorities should only release an alien if there are extenuating circumstances, as used to be the standard practice, not automatically release unless concerns exist. This will require better usage of local jails, perhaps detaining illegals on military bases, and contracting out to private prison companies. The government must inculcate a culture of enforcement among its people and creatively address the needs so the new culture and procedures succeed.

Finally, a system by which federal enforcement agencies can be held accountable is necessary. Bureaucracies respond best when their funding is at stake. A means to ensure that federal agencies are enforcing immigration laws vigorously and cooperating with states and localities is essential.

Conclusion

State and local law enforcement belong on the team fighting immigration crimes. They must become engaged in immigration enforcement if the country is serious about achieving homeland security. State and local police officers are the eyes and ears on the home front. They know their territory. They should be enforcing immigration laws, just as they go after those who violate other laws.

Equally, America must begin to view immigration offenses as "precursor crimes." For that is what they often are. Illegal entry precedes unlawful employment in the United States, for instance, which distorts the economy and disadvantages the law-abiding. Overstaying a visa precedes and gives rise to the commission of such offenses as benefit or document fraud. Failing to depart the country following an order of removal sends an alien into an underworld of false identification, illegal employment, and the like.

Illegal immigration and its accompanying criminal enterprises have fostered foreign terrorist cells within America, smuggling rings that combine drug and alien trafficking, money laundering operations that support al Qaeda and Hamas, drug gangs, and identity fraud schemes. *The Washington Post* several years ago reported the dangers of laxity in immigration enforcement, particularly in the interior: "'[A]lien criminals and terrorists manipulate the [immigration] benefit application process to facilitate expansion of their illegal activities, such as crimes of violence, narcotics trafficking, terrorism and entitlement fraud.' For example, Mir Aimal Kansi, a Pakistani terrorist wanted for fatally shooting two CIA employees outside the agency's headquarters in 1993, had obtained two green cards, one through a political asylum application and the other through the amnesty program."[43] This criminal infrastructure, combined with a mythologized view that projects on illegal immigrants pure motives, love of liberty, and commitment to working hard and making it in America, puts every single American at risk.

Some claim that involving state and local law enforcement in immigration matters would set up a police state. But the alternative to local police enforcing immigration law comes much closer to that outcome. A distinction between citizens and aliens exists, and aliens should face greater scrutiny. Otherwise, citizens as well as aliens would have to submit to increased security requirements at every turn. Better to preserve liberty for our citizens by demanding more of the foreigners within our midst.

Others claim that localized immigration enforcement would curb cooperation by ethnic communities. If police took on immigration enforcement, illegal aliens would not report crimes and police departments would lose their trust, they say. However, no one contemplates police rounding up illegal aliens or mass deportations. Rather, what is proposed here envisions local officers, as they come into contact with suspects in their daily routines, pursuing immigration-related indicators during traffic stops or other normal encounters. Besides, there are some circumstances in which an officer might decide not to ask about immigration status, such as when someone calls for help in an emergency. But police should be able to exercise authority in immigration matters when circumstances dictate.

The combination of confusion over whether authority exists for local police to enforce immigration law, lack of timely access to information and incomplete records, strained resources at all levels, and an overwhelmed immigration agency that has given the impression of indolence and uncooperativeness, all told, have resulted in a major security threat.

Local law enforcement's involvement in enforcing immigration violations would increase homeland security. It would raise the stakes of illegal immigration. It would increase the chances of an illegal alien getting caught. And it would help protect public safety at all levels.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

End Notes

[1] Greg Tuttle, "Tussing Skeptical as Ashcroft Woos City Cops," *Billings Gazette*, October 8, 2002. www.billingsgazette.com/index.php?display=rednews/2002/10/08/build/local/65-tussing-ashcroft.inc

[2] "Local Cops and Visa-Violators," *Christian Science Monitor*, April 30, 2002. www.csmonitor.com/2002/0430/p10s02-comv.html

[3] Steven A. Camarota, *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001*. Washington, D.C.: Center for Immigration Studies, May 2002, p. 51. http://www.cis.org/articles/2002/Paper21/terrorism.html

[4] Associated Press, "Immigrants Freed in Tulsa at Feds' Request," NewsOK.com, July 18, 2002.

[5] Brian Blomquist and Murray Weiss, "Ashcroft: We'll Probe Released-Alien Debacle," NYPost.com, June 1, 2002.

[6] Linda Martin, "5 Illegal Aliens Post Bail; INS Was Unable to Arrange for Deportation, Local Law Officers Told," *Tulsa World*, Aug. 7, 2002.

[7] "Local Cops," *Christian Science Monitor*.

[8] Michelle Malkin, *Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores.* Washington, D.C.: Regnery, 2002, p. 31.

[9] Malkin, *Invasion*, p. 41.

[10] Associated Press, "ACLU Looks into Stratford Police Role in Deportations," *Milwaukee Journal Sentinel*, Feb. 1, 2003. www.jsonline.com/news/State/feb03/115231.asp

[11] Dan Eggen, "U.S. Search Finds 585 Deportee 'Absconders'," *Washington Post*, May 30, 2002.

[12] Jennifer Lee, "State Department Link Will Open Visa Database to Police Officers," *New York Times*, Jan. 31, 2003.

[13] Tanis J. Salant, Christine Brenner, Nadia Rubaii-Barrett, and John R. Weeks, *Illegal Immigrants in U.S./Mexico Border Counties: The Costs of Law Enforcement, Criminal Justice, and Emergency Medical Services* (Executive Summary). U.S./Mexico Border Counties Coalition, Feb. 2001, p. 42. http://www.bordercounties.org/vertical/Sites/{B4A0F1FF-7823-4C95-8D7A-F5E400063C73}/uploads/{14a3a65b-a0de-4f10-a59e-1e84adf7dfe0}.pdf

[14] Bill Hess, "Dever: Pay in Full," Sierra Vista, Ariz., *Herald Review*, Jan. 26, 2003. (www.freerepublic.com/focus/news/829876.posts)

[15] Thomasi McDonald, "Convict Transfer to Save Millions," Raleigh, N.C., *News & Observer*, Jan. 21, 2003. newsobserver.com/news/nc/v-print/story/2118607-2016806c.html

[16] Tuttle, "Tussing Skeptical."

[17] Frank Trejo, "Immigrants from Rig Released; All 25 Found at Dallas Stop Can Stay Until INS Rules on Their Cases," *Dallas Morning News*, Aug. 7, 2002. www.dallasnews.com/local/news/stories/ 080702 dnmetimmigrants.675a2.html

[18] Martin, "5 Illegal Aliens."

[19] Amy Wallace, "Shackles on INS Alienate Kittery Chief," Portsmouth, N.H., *Herald*, Oct. 31, 2002. www.seacoastonline.com/news/10312002/news/32037.htm

[20] Tyra Braden, "District Attorney Seeks to Crack Down on Illegal Immigrants; Northampton County Prosecutor Blames INS for Problems," Allentown, Pa., *Morning Call*, Nov. 14, 2002.

[21] Michelle Malkin, "Who Let Lee Malvo Loose?" *National Review Online*, Oct. 25, 2002. www.nationalreview.com/comment/comment-malkin102502.asp; Jerry Seper and Guy Taylor, "INS Decided Not to Deport Malvo," *Washington Times*, Oct. 29, 2002.

[22] U.S. Department of Justice, Office of the Inspector General, *The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders*, Feb. 2003 (DOJIG Report No. I-2003-004), pp. i-iii. http://www.usdoj.gov/oig/inspection/I-2003-004/index.htm

[23] U.S. Department of Justice Inspector General's report, Feb. 2003, pp. i-iii; James R. Edwards, Jr., "Homeland Security in Knots," *Washington Times*, Sept. 4, 2002, p. A14.

[24] James D. Chadwick and Bart G. Szafnicki, "The Power of Partnership; INS and Local Law Enforcement Join Forces to Stop Criminal Illegal Aliens," *Police Chief*, Aug. 1999, pp. 46-51; James D. Chadwick, Bart G. Szafnicki, and William F. Riley, "Partnership Between INS and Local Law Enforcement," *Eighteen Eleven*, Sept. 1999, Vol. 121, No. 5, pp. 1, 25.

[25] Doris Meissner, INS memorandum re: "Exercising Prosecutorial Discretion," Nov. 17, 2000. Also, see Terence P. Jeffrey, "Meissner's Gift to Criminal Aliens," *Human Events*, Jan. 27, 2003, Vol. 59, No. 4, pp. 1, 8.

[26] U.S. Department of Justice, "Assistance by State and Local Police in Apprehending Illegal Aliens," Memorandum Opinion for the U.S. Attorney, Southern District of California, Feb. 5, 1996, p. 4. (www.usdoj.gov/olc/immstopo1a.htm)

[27] Eric Schmitt, "Administration Split on Local Role in Terror Fight," *New York Times*, April 29, 2002, pp. A1, A21.

[28] Cheryl W. Thompson, "INS role for Police Considered; U.S. Eyes State, Local Help in Enforcing Immigration Laws," *Washington Post*, April 4, 2002.

[29] Department of Justice, Memorandum Opinion, Feb. 5, 1996, p. 1.

[30] Department of Justice, Memorandum Opinion, Feb. 5, 1996, p. 4.

[31] U.S. Tenth Circuit Court of Appeals, U.S. v. Vasquez-Alvarez, May 11, 1999 (176 F.3d 1294), p. 1296. http://www.kscourts.org/ca10/cases/1999/05/98-6325.htm

[32] U.S. v. Vasquez-Alvarez, p. 1294.

[33] U.S. Tenth Circuit Court of Appeals, U.S. v. Santana-Garcia, Sept. 5, 2001 (264 F.3d 1188), p. 1194. http://www.kscourts.org/ca10/cases/2001/09/00-4087.htm

[34] "Fla. Officers to Enforce U.S. Immigration Laws," *Washington Post*, July 20, 2002; Susan Sachs, "A Nation Challenged: Illegal Immigrants; Long Resistant, Police Start Embracing Immigration Duties," *New York Times*, March 15, 2002.

[35] Rules and Regulations, "Abbreviation or Waiver of Training for State or Local Law Enforcement Officers Authorized To Enforce Immigration Law During a Mass Influx of Aliens," *Federal Register*, Feb. 26, 2003 (INS No. 2241-02; AG Order No. 2659-2003) Vol. 68, No. 38, pp. 8820-8822.

[36] Malkin, *Invasion*, p. 48.

[37] Malkin, *Invasion*, pp. 47-49; Bill O'Reilly, "To Protect and Serve," townhall.com, Jan. 11, 2003. www.townhall.com/columnists/billoreilly/printbo 20030111.shtml

[38] John Feinblatt, testimony at an oversight hearing of the House Immigration Subcommittee on "New York's 'Sanctuary' Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration," Feb. 27, 2003. http://www.house.gov/judiciary/feinblatt022703.htm

[39] Jim Brunner, "Immigration Status: City Employees Cannot Ask," *Seattle Times*, Jan. 28, 2003.

[40] O'Reilly, "To Protect and Serve." Also, see the testimony of John Nickell, a Houston police officer, before the House Immigration Subcommittee Feb. 27, 2003. Officer Nickell is challenging his department's "noncooperation" policy that effectively keeps local police from enforcing immigration violations. http://www.house.gov/judiciary/nickell022703.htm

[41] Michael Riley, "Immigration Bill Has Police Uneasy; Officials Say They're Unprepared to Add INS Cases," *Denver Post*, April 22, 2002.

[42] Tim Sullivan, "Should Police, Deputies Help INS Enforce the Law?" *Salt Lake Tribune*, Aug. 26, 2002 www.sltrib.com/08262002/utah/765255.htm; Kris Axtman, "Police Can Now Be Drafted to Enforce Immigration Law," *Christian Science Monitor*, Aug. 19, 2002 www.csmonitor.com/2002/0819/p02s02-usju.html; Michael Fitzgerald, "Should Cops Have to Do INS' Work?" recordnet.com, June 7, 2002. www.recordnet.com/daily/columnists/fitzgerald/fitz060702.html

[43] William Branigan, "Immigration Fraud Schemes Proliferating Inside U.S.; With INS Focused on the Borders, Illegal Aliens Who Get Across Are 'Home Free,' Officials Say," *Washington Post*, May 19, 1997, p. A4.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

NON-PROFIT
U.S. POSTAGE
PAID
PERMIT #6117
WASHINGTON, DC

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Center for Immigration Studies
1522 K Street NW, Suite 820
Washington, DC 20005-1202
(202) 466-8185
center@cis.org
www.cis.org

Backgrounder

Officers Need Backup

The Role of State and Local Police in Immigration Law Enforcement

In the midst of a war against Islamist terrorists, the United States remains woefully — and frighteningly — at risk. Even with the enactment of new laws such as the USA Patriot Act and the Enhanced Border Security and Visa Entry Reform Act and the reorganization of major parts of the federal government into a cabinet-level Department of Homeland Security, the American homeland is not secure.

Not only are the borders themselves still porous, frequently crossed by criminals, smugglers, terrorists, and other lawbreakers, but the interior has very little federal enforcement presence. The federal immigration service has just 2,000 investigators (the agents engaged in enforcement) out of its 37,000 employees. The Border Patrol is deployed almost exclusively along the border. And the Clinton administration's implicit policy of "we'll make it a little tougher for you to sneak across the border, but once inside our country, we won't touch you" remains in force.

7-03